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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

No.

CRAIG DUANE NOKES, Petitioner,

VS.

THE UNITED STATES OF AMERICA, Respondent.

PETITION FOR A WRIT OF CERTIORARI
FROM THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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36 pp

QUESTION PRESENTED

WHETHER THE DISTRICT COURT ERRED IN OVERRULING PETITIONER'S MOTION FOR JUDGMENT OF ACQUITTAL AS THE EVIDENCE WAS INSUFFICIENT TO SUPPORT A JUDGMENT OF CONVICTION FOR POSSESSION OF COCAINE WITH INTENT TO DISTRIBUTE.

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PETITION FOR A WRIT OF CERTIORARI
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FOR THE FIFTH CIRCUIT

The Petitioner, Craig Duane Nokes, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit in this cause.

OPINION BELOW

The opinion of the Court of Appeals for the Fifth Circuit is attached hereto as Exhibit A. Petitioner's Motion For Rehearing was denied April 18, 1985. See Exhibit B.

JURISDICTION

The judgment of the Court of Appeals was entered April 18, 1985. The jurisdiction of this Court is invoked under Title 28 U.S.C. Section 1254(1).

QUESTION PRESENTED

WHETHER THE DISTRICT COURT ERRED IN OVERRULING PETITIONER'S MOTION FOR JUDGMENT OF ACQUITTAL AS THE EVIDENCE WAS INSUFFICIENT TO SUPPORT A JUDGMENT OF CONVICTION FOR POSSESSION OF COCAINE WITH INTENT TO DISTRIBUTE.

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment of the United States Constitution provides in part as follows:

> "No person shall ... be deprived of life, liberty, or property without due process of law ..."

STATEMENT OF THE CASE

Petitioner, Craig Duane Nokes, was convicted in a one count indictment of the felony offense of possession of cocaine with intent to distribute, a violation of Title 21 U.S.C. Section 841(a)(1), for which

Petitioner was sentenced to ten (10) years confinement with a special parole term of three (3) years to run consecutively.

Gayle Miller testified she was employed at Wichita General Hospital as a registered nurse in the emergency room and was so employed on the evening of December 23 and the early hours of December 24, 1983. At that time she had occasion to see Petitioner who was admitted in an injured condition. Petitioner was brought in by an unidentified man who had found him. This man also brought in items consisting of a suitcase, a garment bag, a smaller suitcase, and a shaving kit (R11,12). These items were placed on a cart; Petitioner was then treated for a broken jaw. The person who brought Petitioner soon departed (R13). Miller never saw any type of athletic canvass bag (R20).

Petitioner initially told Miller that he had picked up a hitchhiker who had beaten him

up. Miller told Petitioner that she did not believe this happened because he had a mark on his chest which indicated that part of a steering wheel had hit him as the result of a wreck (R14,15). Petitioner repeated that he had been beaten up by a hitchhiker. Shortly thereafter, Petitioner said he had not been beaten up but that he had been on his way from Dallas to Abilene when he had a wreck (R16).

Hospital policy dictated that if no one was available to take a patient's personal effects, that they were to be given to security. In this case, Petitioner asked that Miller call security to come and take "his things" (R17,18). When Danny Martinez, a security officer, arrived, Petitioner asked that he "take care of his stuff" (R19). Petitioner never handled any of the items in question (R23).

When Petitioner asked Martinez to take

of his "stuff", Miller did not know which items Petitioner was referring to. At the time she already had Petitioner's wallet but could not recall whether she had any type of jewelry (R23,24).

Danny Martinez testified that he was the security officer at Wichita General Hospital and that on the evening of December 23, 1983, he had occasion to go to the emergency room at 10:25 p.m. He saw Petitioner there and took custody of a foldup type piece of luggage which he took to the security office and began inventorying about 10:30 p.m. (R26-33). Inside the bag he found a shaving kit that contained a Crown Royal bag which in turn contained $1,800 in cash (R28). Martinez took a blue sports bag out of the foldup luggage, opened it, and saw a clear plastic bag which he initially thought contained a detergent. He decided to call his supervisor who in turn told him to call

the police (R29-32). The bag had blood stains on it and Martinez thought it might contain some type of valuables. Inside the bag he found some long johns and then discovered a clear plastic baggie which contained a white substance (R30).

At 11:07 p.m. the same evening, Officer Williams arrived and Martinez advised him as to what he had discovered. Officer Williams took the bag in question with him to have the contents analyzed (R35). Ultimately it was determined that the white plastic bag contained eight (8) other baggies which in turn contained 445.9 grams or slightly less than one pound of cocaine whose street value was about $500,000 and whose purity was about 83% (R35,36,76,90,108,112). Martinez identified Government Exhibit #1 as the baggies in question (R36).

Martinez assumed that the luggage was Petitioner's property when he picked it up

because of what the nurse had told him (R45). Martinez never pulled a large suitcase out of the foldup type luggage (R46). At the time he saw Petitioner, Petitioner was lying faceup toward the ceiling on a gurney (R46). Martinez did not recall whether the blood stains on the blue canvass bag were fresh or dry (R50,51).

In the emergency room, Martinez said that Petitioner told him to "take good care of that", which Martinez interpreted to mean the luggage (R55). Martinez had no idea whether Petitioner was looking at him or not when he made this statement, although at one point Petitioner was lying on his side. Martinez was unaware of any other suitcases when he picked up the foldup piece of luggage (R57).

Katherine Holtzen, Records Clerk at the Police Department, identified Government Exhibit #4 as records of the police

department showing various property checked in when Petitioner was placed in jail. It also reflected Petitioner's name written on one of the records, presumably indicating that Petitioner had retrieved the following property: "Cobra radar detector, scissors, razor, shampoo, two bags, boots, and cap in back room, one suit bag hanging in back room with hair dryer" (R130-137).

Holtzen testified that the referenced two bags was written by the jailer and that the reference to the suit bag was not by color, size, brand, or any other dimension. She had never personally seen the suit bag and it was not otherwise identified. There was no mention of any large suitcase or any smaller suitcase or any shaving bag unless the jailer "put it under those two bags" (R139,140).

When the Government rested, so did Petitioner, and the issues were submitted to

the jury.

REASONS FOR GRANTING THE WRIT

WHETHER THE DISTRICT COURT ERRED IN OVERRULING PETITIONER'S MOTION FOR JUDGMENT OF ACQUITTAL AS THE EVIDENCE WAS INSUFFICIENT TO SUPPORT A JUDGMENT OF CONVICTION FOR POSSESSION OF COCAINE WITH INTENT TO DISTRIBUTE.

The essential question before this Court is whether or not the Government proved beyond a reasonable doubt that the Petitioner knowingly and intentionally possessed the cocaine in question. Petitioner submits that as a matter of law, the evidence is insufficient to sustain the judgment of conviction.

Petitioner recognizes the governing principles as to the review of the sufficiency of the evidence on appeal, that is, that the appellate court must review all evidence, both direct and circumstantial, in the light most favorable to the Government and must accept all reasonable inferences and

credible choices that tend to support the jury's verdict. The ultimate standard of review is whether a reasonably minded jury could conclude that the evidence is inconsistent with every reasonable hypothesis of the defendant's innocence. In short, could a reasonable trier of fact find that the evidence established guilt beyond a reasonable doubt in this cause. Glasser v. United States, 315 U.S. 60, 80, 62 S.Ct. 457, 469, 86 L.Ed.2d 680 (1942); United States v. Rodgers, 624 F.2d 1303 (5th Cir. 1981); United States v. Bell, 678 F.2d 547, 549 (5th Cir. 1982).

Petitioner submits at the outset that the proof does not show actual possession. To establish constructive possession there must be proof of dominion and control. Mere presence in the area where the narcotic is discovered or mere association with a person who does control the drug or the property

where it is located is insufficient to support a finding of possession. United States v. Stephenson, 474 F.2d 1353 (5th Cir. 1973); United States v. Martin, 483 F.2d 974 (5th. Cir. 1973). See also United States v. Maspero, 496 F.2d 1354 (5th Cir. 1974).

It is likewise well settled that:

> "To convict someone of possession of contraband with intent to distribute it, in violation of 21 U.S.C. Section 841(a)(1), the Government must prove beyond a reasonable doubt (1) the defendant's possession of the illegal substance, (2) knowledge, and (3) intent to distribute. The requisite intent may be inferred from the quantity of contraband involved ... and possession may be actual or constructive ... Constructive possession may be inferred from the ownership, or the exercise of dominion or control of the vehicle in which the contraband is concealed. United States v. Freeze, 707 F.2d 132 (5th Cir. 1983)."

As emphasized in United States v. Gordon, 700 F.2d 215 (5th Cir. 1983), there must be "some nexus" between the accused and the prohibited substance. Proof of physical

proximity to controlled drugs is not sufficient to establish either actual or constructive possession.

In this case it is uncontroverted that an unidentified man brought Petitioner to the hospital and also brought a number of items which were left in the hospital emergency room. The nurse Miller identified those items as a garment bag, a large suitcase, a smaller suitcase, and a shaving kit. No canvass bag was seen at that time by the nurse.

Petitioner initially said he was beaten up by a hitchhiker but then admitted having been in a wreck. Petitioner wanted a security officer to take custody of his "stuff" or his "things". The nurse and the security officer, during trial, assumed that Petitioner was referring to all of the items initially seen by the nurse and subsequently inventoried by the security officer.

However, the record is likewise clear that for the most part Petitioner was lying faceup on a gurney most of the time in the emergency room and on his side once but that Petitioner never physically pointed toward or verbally indicated identification of any items. Further, to add to the confusion, the security guard never remembered seeing any of the suitcases. At the time Petitioner indicated he wanted a security officer to take his property, the nurse already had Petitioner's wallet.

Subsequently the security guard opened a blue canvass bag which had been taken out of a foldover type bag and ultimately baggies of cocaine were discovered therein which had a significant street value.

Petitioner has always contended that there has never been an affirmative link between Petitioner and the canvass bag in question. Open to question is whether this

canvass bag was ever brought in with the items originally seen by the nurse or whether the canvass bag was obtained from some other unidentified source and placed in the foldover type luggage prior to Petitioner's arrival at the hospital or placed in the foldover type luggage after his arrival having been mixed up with other items taken or belonging to some other individual. There was absolutely no testimony that Petitioner was the only one being treated in the emergency room or that there was no other type of personal effects present in the emergency room at the time in question. As previously noted, to add to the abundance of confusion in this case, several bags were never accounted for by the security officer when he ostensibly left with the items brought in by the unidentified male.

To further emphasize the point, no witness saw Petitioner physically touch or to

be in possession of the canvass bag taken from the foldover piece of luggage. No item within any of the types of luggage was ever connected to Petitioner. The closest that the Government's proof came was a police record which reflected the name of Petitioner signed to one of the police records which in turn reflected that, among other items, two bags and one suit bag were retrieved from the property room of the police department at a subsequent date. None of these items were physically connected up as being the same items referred to as having been seized at the hospital or inventoried. The officer who seized the items at the hospital never testified that the items subsequently taken from the property room were the same items he seized from the Petitioner. Nor was the name of Petitioner signed on the police record ever shown to be signed by Petitioner himself.

Nor is this a case of items in plain view which are obviously contraband. The contraband was secreted under a pair of long johns within the blue bag.

It should further be emphasized that the panel opinion of the Fifth Circuit Court of Appeals disposes of the sufficiency of the evidence contention summarily as follows:

> "There was evidence that the luggage was brought in with Nokes, that Nokes requested Martinez to take good care of it, and that Nokes picked up the luggage from the police when he was released from custody. We have little difficulty in holding that this evidence is sufficient to establish constructive possession, and hence to sustain the verdict."

Petitioner submits that the Court of Appeals' summary dismissal of the sufficiency point does a terrible injustice to Appellant's position and incorrectly construes the facts.

Admittedly, items were brought in with Petitioner but not by Petitioner. Admittedly

Petitioner requested the security officer Martinez to take good care of his "stuff" or "things" but the Government witnesses admitted that they only assumed Petitioner was not only referring to a wallet but to every item in the emergency room. And of course the nurse saw four (4) items and the security officer took into custody only the foldover bag which contained the shaving kit but not the other items. This record is again replete with total confusion and ambiguity and Petitioner submits that the conviction is founded only upon undeserved inferences.

Finally, admittedly Petitioner's name was signed to a police record in reference to certain items being retrieved from the police property room. But the Government's proof never showed that Petitioner signed his own name or that Petitioner himself picked up the very luggage in question which was originally

taken into the hospital by the unidentified man or subsequently searched by the security officer. As a matter of fact, the items which were picked up from the police property room were never shown to be the same items seized from Petitioner at the hospital.

In view of this state of the evidence, Appellant respectfully submits that the Government failed to prove any affirmative link between Petitioner and the bag which contained the narcotics, and that the Government wholly failed to prove beyond a reasonable doubt the guilt of Petitioner of the possession element in the indictment.

Thus, Petitioner respectfully moves this Court to reverse the decision of the United States Court of Appeals and hold that the evidence is insufficient as a matter of law, and thereafter order the entry of a judgment of acquittal. See Burks v. United States, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1

(1978); Greene v. Massey, 437 U.S. 19, 98 S.Ct. 2151, 57 L.Ed.2d 15 (1978).

CONCLUSION

Petitioner submits that as the evidence is insufficient to prove any affirmative connection or link between Petitioner and the narcotics and thus prove Petitioner in possession, that the judgment of conviction should be reversed and a judgment of acquittal entered.

For the reasons set forth above, Petitioner respectfully submits that a Writ of Certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the Petition For Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit was mailed, postage prepaid, to Mr. Harry Koch, Assistant United States Attorney, Federal Building, 1100 Commerce, Room 16G28, Dallas, Texas, and to the Solicitor General, Department of Justice, Washington, DC, 20530, on this the 17th day of June, 1985.

KERRY P. FITZGERALD

STATE OF TEXAS *
*
COUNTY OF DALLAS *

BEFORE ME, the undersigned authority, on this date personally appeared Kerry P. FitzGerald, Attorney for Petitioner, who, after being duly sworn, stated:

My name is Kerry P. FitzGerald and I am

counsel for Petitioner Craig Duane Nokes in this cause. I hereby state under oath that this Petition For Writ of Certiorari was deposited in the United States Post Office, with first-class postage prepaid, on the 17th day of June, 1985, and addressed to the Office of the Clerk, United States Supreme Court, Washington, DC 20543.

KERRY P. FITZGERALD

SUBSCRIBED AND SWORN TO before me on this the 17th day of June, 1985.

Notary Public in and for Dallas County, State of Texas

My Commission expires:

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 84-1868
Summary Calendar

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

VS.

CRAIG DUANE NOKES,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Texas

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(March 25, 1985)

Before GEE, JOHNSON, and DAVIS, Circuit Judges.*

DAVIS, Circuit Judge:

On December 23, 1983, an unidentified individual brought Craig Duane Nokes to the emergency room of the Wichita General Hospital for treatment of injuries sustained in an automobile accident. Nokes' injuries called for surgery, and Nokes requested that

a hospital security guard take possession of his valuables. Security officer Danny Martinez complied, and Nokes requested that he take good care of that. Following standard hospital procedure, Martinez inventories the luggage in the hospital security office, and in the process discovered a Seagram's Crown Royal whiskey bag containing $1,800 and several plastic bags containing a white powdery substance. His suspicions aroused, Nartinez called the Wichita Falls police. When the police arrived, the bags of white powder were lying on a desk in the security office. A field test was performed and it was ascertained that the powder was cocaine.

Nokes was indicted for possession of cocaine with intent to distribute in violation of 21 U.S.C. Sec. 841(a)(1). Prior to trial, he moved to suppress the cocaine as the fruit of an unlawful search and seizure.

After an evidentiary hearing, the district court denied the motion to suppress. Nokes was convicted and sentenced to ten years in prison. In this direct appeal from that conviction, Nokes makes three contentions.

(1) The district court erred in failing to suppress the cocaine because the initial search of his luggage by Martinez was illegal; (2) the search and seizure of the cocaine by the Wichita Falls police was illegal; and, (3) the district court erred in denying his motion for acquittal because the government's evidence was insufficient to sustain a conviction. We affirm.

I.

In United States v. Jacobsen, 80 L.Ed.2d 85, 94 (1984), the Supreme Court reaffirmed the established principle that the fourth amendment proscribes "only governmental action; it is wholly inapplicable to a search or seizure, even an unreasonable one,

effected by a private individual not working as an agent of the Government or with the participation or knowledge of any government official." Nokes contends that the initial inventory of his luggage was an illegal search because Martinez, in his capacity as a security officer at the Wichita General Hospital, was acting as an agent of the state and therefore was subject to the strictures of the fourth amendment. In support of this contention Nokes cites several facts: that the duties of a hospital security guard are extremely similar to those of a police officer; security guards are trained to observe criminal behavior and report criminal behavior to police; security guards generally work closely with police; the police expect that security guards will work closely with them; and Wichita General is a public hospital, receiving an unspecified amount of

funding from the county. We do not find these facts sufficient to establish that Martinez was acting as the agent of the state in the initial intrusion into Nokes' luggage.

There is simply no reason to believe in this case that Martinez was "acting as an agent of the government or with the participation or knowledge of any government official." The simple fact of cooperation with law enforcement officials, even when it takes the form of an explicit directive from management to cooperate, is not sufficient to meet this test. See United States v. Barry, 673 F.2d 912, 915 (6th Cir. 1982), cert. denied, 459 U.S. 927 (1983). That a security guard's job bears some similarity to that of a a law enforcement officer likewise does nothing to change the private character of his actions. See United States v. Francouer, 547 F.2d 891, 893-94 (5th Cir. 1977)(Disney World security guards not state agents).

Nokes next contends that even if Martinez was not a state agent, the subsequent search and seizure by the Wichita Falls police went so far beyond the scope of Martinez' initial intrusion that suppression is required. In United States v. Jacobsen, the Supreme Court addressed the question of when an official search following a private search violates the fourth amendment. The court states that the "Fourth Amendment is implicated only if the authorities use information with respect to which the [defendant's] expectation of privacy has not already been frustrated." 80 L.Ed.2d at 97. Here, as in Jacobsen, the defendant's expectation of privacy regarding the contents of a container was already frustrated by the private search. The cocaine was in plain view on a desk when the police arrived. "[It] hardly infringed respondent's privacy for the agents to reexamine the contents of

the open package ..." Id. at 98. Jacobsen also expressly found that a field test of the sort conducted in this case was not a fourth amendment violation. We therefore find no merit to Nokes' first two assignments of error.

II.

Nokes also contends that the evidence introduced at trial was insufficient to sustain a conviction, because there was no evidence that he had actual physical control over the luggage or that the luggage in fact belonged to him. We are bound to follow the rule that "a conviction should be reversed only when the evidence is so weak or so contrary to guilt that it would compel a jury to entertain a reasonable doubt of the defendant's guilt." In this determination we view the evidence, together with reasonable inferences from it, in the light most favorable to the verdict. United States v.

Del Aguila-Reyes, 722 F.2d 155, 157 (5th Cir. 1983). There was evidence that the luggage was brought in with Nokes, that Nokes requested Martinez to take good care of it, and that Nokes picked up the luggage from the police when he was released from custody. We have little difficulty in holding that this evidence is sufficient to establish constructive possession, and hence to sustain the verdict. See United States v. Cardenas, 748 F.2d 1015, 1019 (5th Cir. 1984).

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 84-1868

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

VS.

CRAIG DUANE NOKES,
Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas

ON PETITION FOR REHEARING
(April 18, 1985)

Before GEE, JOHNSON, and DAVIS, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the Petition For Rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:
United States Circuit Judge W. Eugene Davis